

Section VII. Subletting and Subcontracting

Chapter 14. Subletting and Subcontracting Fair Practices Act

PUBLIC CONTRACT CODE DIVISION 2. CHAPTER 4. SUBLETTING AND SUBCONTRACTING FAIR PRACTICES ACT

Short Title

4100. This chapter may be cited as the “Subletting and Subcontracting Fair Practices Act.”

Results of Bid Peddling

4101. The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils.

Preservation of Rights and Remedies

4103. Nothing in this chapter limits or diminishes any rights or remedies, either legal or equitable, which:

- (a) An original or substituted subcontractor may have against the prime contractor, his successors or assigns.
- (b) The State or any county, city, body politic, or public agency may have against the prime contractor, his successors or assigns, including the right to take over and complete the contract.

Contents of Bids or Offers

4104. Any officer, department, board or commission taking bids for the construction of any public work or improvement shall provide in the specifications prepared for the work or improvement or in the general conditions under which bids will be received for the doing of the work incident to the public work or improvement that any person making a bid or offer to perform the work, shall, in his or her bid or offer, set forth:

- (a)(1) The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and

specifications, in an amount in excess of one-half of 1 percent of the prime contractor’s total bid or, in the case of bids or offers for the construction of streets or highways, including bridges, in excess of one-half of 1 percent of the prime contractor’s total bid or ten thousand dollars (\$10,000), whichever is greater.

(2)(A) Subject to subparagraph (B), any information requested by the officer, department, board, or commission concerning any subcontractor who the prime contractor is required to list under this subdivision, other than the subcontractor’s name and location of business, may be submitted by the prime contractor up to 24 hours after the deadline established by the officer, department, board, or commission for receipt of bids by prime contractors.

(B) A state or local agency may implement subparagraph (A) at its option.

(b) The portion of the work that will be done by each subcontractor under this act. The prime contractor shall list only one subcontractor for each portion as is defined by the prime contractor in his or her bid.

(Added by Stats. 1986, Chapter 195; Amended by Stats. 1988, Chapter 1578; Stats. 1998, Chapter 1010 (AB 1092).)

Invitation to Bid; Closing of Submission Dates; Extensions

4104.5. (a) The officer, department, board, or commission taking bids for construction of any public work or improvement shall set forth in the bid invitation a date and time for closing of submission of bids by prime contractors. The date and time shall be extended by no less than 72 hours in the event the officer, department, board, or commission issues any material changes, additions, or deletions to the invitation later than 72 hours prior to the bid closing.

(b) As used in this section, the term “material change” means a change with a substantial cost impact on the total bid as determined by the awarding agency.

(c) As used in this section, the term “bid invitation” shall include any documents issued to prime contractors that contain descriptions of the work to be bid or the content, form, or manner of submission of bids by bidders.

(Added by Stats. 1998, Chapter 1010 (AB 1092).)

Penalty for Attempts to Circumvent Requirements

4105. Circumvention by a general contractor who bids as a prime contractor of the requirement under Section 4104

for him to list his subcontractors, by the device of listing another contractor who will in turn sublet portions constituting the majority of the work covered by the prime contract, shall be considered a violation of this chapter and shall subject such prime contractor to the penalties set forth in Sections 4110 and 4111.

Failure to Specify Subcontractor

4106. If a prime contractor fails to specify a subcontractor or if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, he agrees that he is fully qualified to perform that portion himself, and that he shall perform that portion himself.

If after award of contract such prime contractor shall, except as provided for in Sections 4107 or 4109, subcontract any such portion of the work, such prime contractor shall be subject to the penalties named in Section 4111.

Substitution of Subcontractor

4107. Prime contractor whose bid is accepted; prohibitions
A prime contractor whose bid is accepted may not:

(a) Substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor in any of the following situations:

(1) When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract, when that written contract, based upon the general terms, conditions, plans and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

(2) When the listed subcontractor becomes bankrupt or insolvent.

(3) When the listed subcontractor fails or refuses to perform his or her subcontract.

(4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in Section 4108.

(5) When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error.

(6) When the listed subcontractor is not licensed pursuant to the Contractors License Law.

(7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the listed subcontractor is ineligible to work on a public works project pursuant to Section 1777.1 or 1777.7 of the Labor Code.

(9) When the awarding authority determines that a listed subcontractor is not a responsible contractor.

Prior to approval of the prime contractor's request for the substitution the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified shall have five working days within which to submit written objections to the substitution to the awarding authority. Failure to file these written objections shall constitute the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

(b) Permit a subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer.

(c) Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which his or her original bid did not designate a subcontractor.

(Amended by Stats.1998, Chapter 443 (AB 1569); Stats.1999, Chapter 972 (AB 574).)

Carpet Subcontractor

4107.2. No subcontractor listed by a prime contractor under Section 4104 as furnishing and installing carpeting, shall voluntarily sublet his subcontract with respect to any portion of the labor to be performed unless he specified the subcontractor in his bid for such subcontract to the prime contractor.

Inadvertent Clerical Error

4107.5. The prime contractor as a condition to assert a claim of inadvertent clerical error in the listing of a subcontractor shall within two working days after the time of the prime bid opening by the awarding authority give written notice to the awarding authority and copies of such notice to both the subcontractor he claims to have listed in error and the intended subcontractor who had bid to the prime contractor prior to bid opening.

Any listed subcontractor who has been notified by the prime contractor in accordance with the provisions of this section as to an inadvertent clerical error shall be allowed six working days from the time of the prime bid opening within which to submit to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error. Failure of such listed subcon-

tractor to file such written notice within the six working days shall be primary evidence of his agreement that an inadvertent clerical error was made.

The awarding authority shall, after a public hearing as provided in Section 4107 and in the absence of compelling reasons to the contrary, consent to the substitution of the intended subcontractor:

(a) If (1) the prime contractor, (2) the subcontractor listed in error and (3) the intended subcontractor each submit an affidavit to the awarding authority along with such additional evidence as the parties may wish to submit that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight working days from the time of the prime bid opening, or

(b) If such affidavits are filed by both the prime contractor and the intended subcontractor within such specified time but the subcontractor whom the prime contractor claims to have listed in error does not submit within six working days, to the awarding authority and to the prime contractor, written objection to the prime contractor's claim of inadvertent clerical error as provided in this section.

If such affidavits are filed by both the prime contractor and the intended subcontractor but the listed subcontractor has, within six working days from the time of the prime bid opening, submitted to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error, the awarding authority shall investigate the claims of the parties and shall hold a public hearing as provided in Section 4107 to determine the validity of such claims. Any determination made shall be based on the facts contained in the declarations submitted under penalty of perjury by all three parties and supported by testimony under oath and subject to cross-examination. The awarding authority may, on its motion or that of any other party, admit testimony of other contractors, any bid registries or depositories, or any other party in possession of facts which may have a hearing on the decision of the awarding authority.

Failure of Contractor To Pay Subcontractor for Action Taken Related to Hazardous Material or Waste; Service of Stop Notice

4107.7. Failure of contractor with contract with public entity for investigation, removal, or remedial action, or disposal relative to release or presence of hazardous material or waste to pay subcontractor; service of stop notice

If a contractor who enters into a contract with a public entity for investigation, removal or remedial action, or disposal relative to the release or presence of a hazardous material or hazardous waste fails to pay a subcontractor registered as a hazardous waste hauler pursuant to Section 25163 of the Health and Safety Code within 10 days after the investigation, removal or remedial action, or disposal is completed, the subcontractor may serve a stop notice upon the public entity in accordance with Chapter 4 (commencing with Section 3179) of Title 15 of Part 4 of Division 3 of the Civil Code.

Faithful Performance and Payment Bonds of Subcontractors

4108. (a) It shall be the responsibility of each subcontractor submitting bids to a prime contractor to be prepared to submit faithful performance and payment bond or bonds if so requested by the prime contractor.

(b) In the event any subcontractor submitting a bid to a prime contractor does not, upon the request of the prime contractor and at the expense of the prime contractor at the established charge or premium therefor, furnish to such prime contractor a bond or bonds issued by an admitted surety wherein the prime contractor shall be named the obligee, guaranteeing prompt and faithful performance of such subcontract and the payment of all claims for labor and materials furnished or used in and about the work to be done and performed under such subcontract, the prime contractor may reject such bid and make a substitution of another subcontractor subject to the provisions of Section 4107.

(c) (1) The bond or bonds required under this section is to be borne by the subcontractor, that requirement shall also be specified in the prime contractor's written or published request for subbids.

(2) If the expense of the bond or bonds required under this section is to be borne by the subcontractor, that requirement shall also be specified in the prime contractor's written or published request for subbids.

(3) The prime contractor's failure to specify bond requirements, in accordance with this subdivision, in the written or published request for subbids shall preclude the prime contractor from imposing bond requirements under this section.

(Added by Stats. 1991, Chapter 754 (S.B. 580).)

Subletting Work in Excess of 1/2 of 1%

4109. Subletting or subcontracting of any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which no subcontractor was designated in the original bid shall only be permitted in cases of public emergency or necessity, and then only after a finding reduced to writing as a public record of the awarding authority setting forth the facts constituting the emergency or necessity.

Penalty for Violating Provisions

4110. A prime contractor violating any of the provisions of this chapter violates his contract and the awarding authority may exercise the option, in its own discretion, of (1) cancelling his contract or (2) assessing the prime contractor a penalty in an amount of not more than 10 percent of the amount of the subcontract involved, and this penalty shall be deposited in the fund out of which the prime contract is awarded. In any proceedings under this section the prime contractor shall be entitled to a public hearing and to five days' notice of the time and place thereof.

Disciplinary Action for Violations

4111. Violation of this chapter by a licensee under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code constitutes grounds for disciplinary action by the Contractors State License Board, in addition to the penalties prescribed in Section 4110.

Failure to Comply No Defense

4112. The failure on the part of a contractor to comply with any provision of this chapter does not constitute a defense to the contractor in any action brought against him by a subcontractor.

“Subcontractor” and “Prime Contractor” Defined

4113. As used in this chapter, the word “subcontractor” shall mean a contractor, within the meaning of the provisions of Chapter 9 (commencing with Section 7000)

of Division 3 of the Business and Professions Code, who contracts directly with the prime contractor.

“Prime contractor” shall mean the contractor who contracts directly with the awarding authority.

Counties With Population of 6,000,000 or More; Board of Supervisors as Awarding Authority; Delegation of Certain Functions to Hearing Officer; Recommendations

4114. The county board of supervisors, when it is the awarding authority, may delegate its functions under Sections 4107 and 4110 to any officer designated by the board.

The authorized officer shall make a written recommendation to the board of supervisors. The board of supervisors may adopt the recommendation without further notice or hearing, or may set the matter for a de novo hearing before the board.

(Added by Stats. 1989, Chapter 43.)